IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.224 OF 2006

1. Shri Avinash Vishnu Khandekar
2. Shri Mandakini Khandekar
3. Smt. Kalpalata Vijay Khare
4. Smt. Sulbha Atul Kapadi
5. Smt. Mangala Pendharkar .. Appellants

Versus

1. Deshmukh & Co. (publishers) Pvt. Ltd.
2. Ravindra Vasudeo Godbole
3. Shri Ramchandra Dattatraya Tulpule
4. Shri Madhav Khanderao Gharpure
5. Shri Sadashiv Balkrishna Kulkarni
6. Shri Mohan Madhav Reddi
7. Shri Shrikant Pandharinath Kulkarni ..Respondents

Ms. Kalyani Kulkarni-Phatak with Ms.Madhavi Deshpande-Ravuri for the Appellants
Shri S.G. Karandikar for the Respondent No1

CORAM : S.R. SATHE,J.
DATED : 27/09/2007

ORAL ORDER :-

1. The Appellants-original Plaintiffs in Special Civil Suit No.5 of 2001 have preferred this appeal

against the order passed below Exh-5 by the Court of 9th Ad-hoc Additional District Judge, Pune whereby Plaintiffs' application for temporary injunction restraining defendants from publishing or otherwise dealing with the literature of Late Shri V.S. Khandekar was dismissed and Plaintiffs' prayer for appointment of Commissioner to attach and confiscate all printing material, manuscript bound/unbound copies of books of literature of Late Shri V.S. Khandekar was rejected. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

Plaintiffs are the legal heirs of Late Shri V.S. Khandekar, a well known Marathi author and recipient of prestigious award of Gyanpeeth for his book 'Yayati'. During his lifetime, Late Shri V.S. Khandekar had written, edited number of books, articles in Marathi. On 19/05/1973, late Shri V.S. Khandekar entered into a publishing license agreement with one R.J. Deshmukh, owner of Deshmukh and Company, a well known publisher. According to Plaintiffs, as per the said agreement, R.J. Deshmukh had undertaken to render the account of publication of books by the end of

December of every year and pay royalty within 3 months thereof and also to comply other conditions.

3. It is Plaintiffs' case that on 02/09/1976, Shri V.S. Khandekar expired and as per his will another Marathi author of great repute namely Ranjit Desai was appointed as executor. Heirs of Late Shri V.S. Khandekar filed RCS No.1174 of 1981 through Ranjit Desai against R.J. Deshmukh alleging that he has committed breach of condition of the agreement dated 19/05/1973. However, the said suit was dismissed on 28/09/1988. Heirs of late Shri V.S. Khandekar preferred appeal bearing No.RCA No.40 of 1991. The said appeal was partly allowed and it was held that late R.J. Deshmukh did not commit any breach in respect of 12 books and the heirs of V.S. Khandekar were allowed to publish 60 books. Heirs of V.S. Khandekar preferred Second Appeal in High Court. However, the same was abated and the application for restoration also came to be dismissed.

4. It was contended that late R.J. Deshmukh had executed a Will in favour of his wife Sulochanabai and she had formed a Private Limited Company on 11/05/1989 in the name of Deshmukh and Company (Publishers)

Private Limited (present defendant No.7). The present defendant Nos.1 to 6 are the directors of the defendant No.7 Company. According to Plaintiffs, the defendant No.7 filed suit No.1 of 1998 in the District Court, Pune in respect of Autobiography of V.S. Khandekar i.e. "एका पानाची कहाणी". They had also filed another Civil Suit No.2 of 1998 against heirs of late Shri V.S. Khandekar claiming that they had exclusive copyright in respect of following 12 books of Late Shri V.S. Khandekar namely : 1. Yayati, 2. Amrutvel, 3. Don Mane, 4. Don Dhruv, 5. Rikama Devhara, 6. Sukhacha Shodh, 7. Ashru, 8. Pandhare Dhag, 9. Chrounch Vadh, 10. Soneri Swapne Bhangleli, 11. Hirawa Chapha, 12. Marathi Natya Sansar. However, the same was dismissed by the Additional District Judge, Pune on 03/02/2001. According to Plaintiffs, they alone are the owners of copyright in all the literally work of Late Shri V.S. Khandekar including the above mentioned 12 books. Plaintiffs informed the defendant No.7 Company not to publish and sale books of Late Shri V.S. Khandekar and infringe copy rights of Plaintiffs. Inspite of the same, the defendant No.7 continued to publish the above mentioned 12 books. Not only that but the defendant No.7 also filed criminal case against one Rajesh Shah to whom the Plaintiffs had authorized to publish and sale the books

'Yayati' and 'Amrutvel'. According to Plaintiffs, defendants in fact infringed copyright of Plaintiffs in respect of 13 books written by Late Shri V.S. Khandekar and thereby caused damage of Rs.2,00,000/- to the Plaintiffs. The defendants did not pay single farthing towards the royalty since the year 1980. The defendants continued to infringe the copyrights of Plaintiffs. Hence, Plaintiffs filed Special Civil Suit No.5 of 2001 in the District Court, Pune and prayed that all the copies of 13 books printed, published by the defendants be attached through Commissioner. They also prayed for damages of Rs.7 lakhs from the defendants and prayed for permanent injunction restraining defendants from infringing the copyright of Plaintiffs in the literature of Late Shri V.S. Khandekar.

5. Plaintiffs also filed an application Exh-5 for temporary injunction and prayed for attachment of the above mentioned books through Commissioner and for temporary injunction restraining defendants from publishing or otherwise dealing with the literature of Late Shri V.S. Khandekar.

6. The defendant No.7 resisted the application by filing say at Exh-17. They denied all the allegations

of the Plaintiffs and contended that they are only concerned with the printing and publishing 13 books. According to them, they have a right to print and publish the above books which was recognized by the District Court, Kolhapur in Civil Appeal No.40 of 1989 as long back in 1990 and Second Appeal preferred by the present Plaintiffs was abated and thus, right recognized by the District Court, Kolhapur acquired finality. The defendant No.7 also contended that as per the terms and conditions of the agreement dated 19/05/1973, late Shri R.J. Deshmukh was authorized to make an arrangement regarding publication of the said book after his death. The defendants also contended that Plaintiffs' claim with regard to 12 books mentioned above was already dismissed and as such, Plaintiffs are not entitled for temporary injunction as prayed. They also contended that Plaintiff had filed suit in the District Court, Sangli bearing No.4 of 2000 and 5 of 2000 and prayed for injunction. However, temporary injunction prayed by the Plaintiffs in the said suit was refused and ultimately, Plaintiffs withdrew the said suit and as such Plaintiffs are not entitled to seek similar relief in the present suit.

7. The defendant No.7 also contended that though

Civil Suit No.2 of 1998 was decided against them, they preferred appeal bearing No.276 of 2001 in the High Court of Bombay. The said appeal was also dismissed but defendants have preferred SLP in the Supreme Court and the same has been admitted. So, it is contended on behalf of the defendant that the issue with regard to defendants' right under the agreement is subjudice and under the circumstances, Plaintiffs are not entitled for temporary injunction.

8. After hearing the arguments advanced by both the learned Advocates and considering the documents produced by both the parties, the Additional District Judge, Pune came to the conclusion that issue with regard to defendants' right under the agreement is pending before the Hon'ble Supreme Court. The District Court, Pune in Appeal No.40 of 1989 had held that defendants are having a right to publish 13 books and the said decision has acquired finality. So, the learned Trial Judge observed that Plaintiff has failed to make out any prima facie case. According to him, balance of convenience was also not in favour of Plaintiffs because if they succeed in the suit they are entitled to recover royalty. So, the loss if suffered by the Plaintiffs can be compensated in terms of money.

The Trial Court, therefore, held that Plaintiffs are not entitled for temporary injunction and dismissed the application.

9. The above mentioned dismissal order is challenged in the present appeal. In this appeal before me, Ms. Kalyani Kulkarni-Pathak, learned Advocate for the Appellant-Plaintiffs submitted that the learned Trial Judge has failed to consider the fact that the suit bearing No.2 of 1998 filed by the defendants claiming exclusive copyright in respect of the 12 books of Late Shri V.S. Khandekar has been rejected by the District Court as well as by the High Court. So, merely because the defendants have filed SLP against the said decision and the same is admitted, it can not be said that defendants are having any right to print and publish 12 books of Late Shri V.S. Khandekar. Secondly, she canvassed before me that refusal to grant temporary injunction would amount to allowing the defendants to commit breach of copyright which is an offence as per the Section-63 of the Copyright Act. She, therefore, submitted that Plaintiffs have made out a prima facie case for granting temporary injunction as prayed and the balance of convenience is in their favour. As against this, Shri Karandikar, learned Advocate for the

defendants supported the order passed by the learned Trial Judge. He submitted that even in the SLP no interim relief is claimed by the Plaintiffs. The earlier decision in Civil Appeal No.40 of 1989 has acquired finality and as such, Plaintiffs are not entitled to get temporary injunction. He also submitted that even if Plaintiffs succeed in the suit, they can be adequately compensated in terms of money. So, relief of injunction can not be granted.

10. It is really most unfortunate that the literature or the books written by the well known Marathi author Late Shri V.S. Khandekar have become the subject matter of dispute between two parties and the litigation is going on in respect of the copyrights and other rights in respect of the said books right from the year 1981. However, there is no dispute that Late Shri V.S. Khandekar had entered into an agreement dated 19/05/1973 with Late R.J. Deshmukh, owner of Deshmukh ad Company. The dispute is in fact in respect of the nature of rights given to R.J. Deshmukh under the said agreement. According to Plaintiffs, the rights given to R.J. Deshmukh were in the nature of license to print and publish Marathi literature of Late V.S. Khandekar in respect of 14 books and that was also personal right

given to R.J. Deshmukh which has come to an end after his death. As against this, it is the case of the defendants that they have in fact got a copyright in respect of at least 12 books mentioned above and the agreement dated 19/05/1973 is in the nature of partial assignment. It is needless to say that while determining the question regarding the rights given by the late V.S. Khandekar under the agreement in question one has to see the entire agreement and read it as a whole. At some places in the agreement, Shri R.J. Deshmukh is named as owner of Deshmukh and Company. While in clause-4 of the said agreement it is mentioned “Shri Ram Jaywant Deshmukh, Deshmukh and Company shall have the right to publish the literature of Shri V.S. Khandekar etc.” So, thereby indicating that right was in fact created in favour of Deshmukh and Company. However, while considering the present application for temporary injunction. It was necessary for the Court to take into consideration the outcome of the earlier litigation between the parties. It is an admitted fact that the present Plaintiffs had filed suit through Ranjit Desai against Late Shri R.J. Deshmukh bearing No.1174 of 1981 wherein the heirs of Late Shri V.S. Khandekar had claimed that they have inherited the copyright of Late Shri V.S. Khandekar and R.J. Deshmukh

is committing the breach of the said right. However, the said suit was dismissed on 28/09/1988. The present Plaintiffs preferred regular civil appeal No.40 of 1991. During the pendency of appeal R.J. Deshmukh died and his only heir Sulochana Deshmukh was brought on record and suit was partly decreed holding that Late Deshmukh did not commit any breach only in respect of 12 books and the heirs of V.S. Khandekar were allowed to publish 60 books.

11. The present Plaintiffs preferred Second Appeal against the said decision and the said Second appeal was abated. So, one thing is certain that the said decision of the District Court has become final and it is binding on both the parties. By virtue of the said decision prima facie it does appear that R.J. Deshmukh and Sulochanabai were allowed to print and publish 12 books of Late Shri V.S. Khandekar.

12. The most important point which goes against the present Plaintiffs so far as application for temporary injunction is concerned is that previously they had filed Civil Suit No.4 of 2000 in the District Court, Sangli claiming similar relief. In that suit also they had filed application Exh-5 for temporary injunction and prayed following reliefs.

> ***"(A) Till the final disposal of this suit, defendant be restrained from obstructing sale of books of Yayati and Amrutvel published by Plaintiff No.2.***
>
> ***(B) Till final disposal of present suit, defendant be restrained from publishing the 14 books mentioned in the plaint."***

Admittedly, the said application for temporary injunction was rejected by the 4th Additional District Judge, Sangli on 29/01/2001. There is nothing on record to show that the present plaintiffs had preferred any appeal against the said decision. On the contrary, admittedly Plaintiffs thereafter withdrew the said suit unconditionally on 21/03/2001. So, we can not ignore the fact that the relief which is now being claimed by the Plaintiffs in the present application for temporary injunction was once rejected and the said order had become final. From the fact that Plaintiffs,

thereafter, withdrew the said suit, in a way indicates that they had given up their claim in the said suit. The said suit was not withdrawn with permission to file fresh suit on the same cause of action. It must be noted that Plaintiffs have not disclosed the above mentioned fact of filling Civil Suit No.4 of 2000 and dismissal of their application for temporary injunction. In my opinion, they have thus, suppressed the material fact while filing the present suit and the application for temporary injunction. So, it can not be said that they approached to the Court with clean hands. So, on this ground alone their application for temporary injunction is liable to be rejected.

13. The learned Advocate for the Appellants-Plaintiffs strenuously argued before me that the defendant had filed a suit No.20 of 1998 against the Plaintiffs claiming exclusive copyright in respect of the above named 12 books and the said suit has been dismissed. The First appeal No.276 of 2001 filed by the present defendants is also dismissed by this Court and under such circumstances Plaintiffs are entitled for temporary injunction. Firstly, it must be noted that by virtue of the decision in First Appeal No.276 of 2001, it is only held that the defendants are not having

exclusive right in respect of the 12 books as alleged and they can not restrain the present Plaintiffs from printing and publishing the said 12 books. That does not mean that the defendants are not at all entitled to print and publish the above mentioned 12 books. It is an admitted fact that the present Plaintiffs are also entitled to print and publish the above mentioned 12 books and other books written by Late Shri V.S. Khandekar. Thus, when Plaintiffs are allowed to print and publish all the Marathi Literature of V.S. Khandekar it can not be said that if the temporary injunction is not granted Plaintiffs are likely to suffer irreparable loss. Incidentally, it appears that while passing order in FA-276 of 2001 the fact of earlier dismissal of Plaintiff's application in suit No.4 of 2000 was not considered.

14. It must be noted that in the plaint, Plaintiffs have in fact claimed about Rs.7 lakhs by way of damages. So, it is very clear that this is not a case where loss, if suffered by the Plaintiffs, can not be compensated in terms of money. So, the learned Trial Court has rightly observed that under such circumstances, Plaintiffs are not entitled to get temporary injunction as prayed. The discretion used by

the learned Trial Judge in rejecting the Plaintiffs' claim for blanket temporary injunction can not be said to be improper. When such is the position this Court which is Appellate Court need not interfere with the order passed by the learned Trial Judge, particularly, when it is clear that the discretion used by the learned Trial Judge can not be said to be arbitrary or capricious.

15. Incidentally, it must also be noted here that the suit was filed in 2001 and the temporary injunction application was also filed in 2001. The same has been dismissed on 31/01/2006. During the intervening period, there was no interim relief granted in favour of Plaintiff. It seems that even then Plaintiffs did not insist for the hearing of the said application. So having regard to all these facts and circumstances of the case, I pass the following order :-

O R D E R

The appeal is partly allowed.

The order passed by the learned Trial Judge is modified and the application Exh-5 in Special Civil Suit no.5 of 2001 is partly allowed.

The defendants are restrained from printing and publishing the literature of late Shri V.S. Khandekar

except 12 books mentioned in the main part of this judgement, till the disposal of the suit.

The defendants are directed to maintain accounts in respect of the 12 books mentioned above.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R.SATHE,J.)